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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1942.

No. **805**

HENRY G. WOOD, JO. V. MORGAN, ALEXANDER TUCKER, J. H.  
LEWIS, *Petitioners,*

v.

J. MILLARD TAWES, Comptroller State of Maryland; HARRY  
O. LEVIN, THOMAS W. KOON, J. DEWEESE CARTER, State  
Tax Commission, State of Maryland.

**PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF MARYLAND.**

ALEXANDER F. PRESCOTT, JR.,  
JO. V. MORGAN,  
CLARENCE E. DAWSON,  
*Attorneys for the Petitioners.*



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Tax Commission, State of Maryland.

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**PETITION FOR WRIT OF CERTIORARI TO THE  
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The petitioners, Henry G. Wood, Jo. V. Morgan, Alexander Tucker, and J. H. Lewis pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above causes on December 18, 1942, affirming the decisions of the State Tax Commission of Maryland and of the Circuit Court of Montgomery County, Maryland.

### **OPINIONS BELOW.**

The rulings of the State Tax Commission of Maryland (R. 12, 26, 45 and 66) are not reported. The opinions of the Circuit Court for Montgomery County, Maryland (R. 15, 29, 49 and 69) are not reported. The opinion of the Court of Appeals of Maryland (R. 79-87) is reported in 28 A (2d) 850.

### **JURISDICTION.**

The judgment of the Court of Appeals of Maryland was entered December 18, 1942 (R. 88). The jurisdiction of this Court is invoked under section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

### **QUESTIONS PRESENTED.**

1. Whether Maryland can constitutionally tax the income of an individual domiciliary earned outside of the state during the taxable year, before he became resident or domiciled in Maryland.

2. Does the Maryland Income Tax Law violate the rule of implied intergovernmental immunity, as limited by the decisions of this Court; the Public Salary Tax Act of 1939 or the equal protection clause of the Fourteenth Amendment to the Constitution, by imposing a tax upon compensation paid by the United States and its agent, the District of Columbia, to their public officers and employees and, at the same time, exempting compensation paid by the State to its public officers?

3. Has Maryland power under the Constitution, to impose an income tax upon the income of a person domiciled in another state but residing in Maryland on the last day of the taxable year while performing his duties as an officer or employee of the United States, where such duties are performed and the compensation therefor is paid outside of the State?

4. Has Maryland power to impose a tax upon the income of a member of the Armed Forces of the United States, domiciled in another state, but residing in Maryland while in performance of his duties as a member of such Armed Forces?

5. Does the Maryland Income Tax Law violate the Fourteenth Amendment of the Constitution in that it severs the sources of income arbitrarily into two distinct classes, namely, "investment income" and "ordinary income" and applies different credits and rates of taxation to such two classes?

#### **STATUTES INVOLVED.**

The statutes involved will be found in the Appendix, *infra*, pp. 20-26.

#### **STATEMENTS.**

A number of persons, approximately seventy, consisting of officers and employees of the Federal Government, the District of Columbia, and the Armed Forces of the United States, filed petitions with the State Tax Commission of Maryland, appealing from the assessment of income taxes made against them by the Comptroller of Maryland. These four cases were selected by the parties as typical of four classes of taxpayers and were consolidated for hearing and disposition in the State Tax Commission; in the Circuit Court for Montgomery County, Maryland, and in the Court of Appeals of Maryland. In each of the four cases the income taxed by the State of Maryland was compensation paid to the taxpayers by the Federal Government or the District of Columbia. Such compensation was paid, and the services were rendered outside of Maryland. Hence, in all four cases there arise the questions of implied inter-governmental immunity and unlawful discrimination. These are the only questions involved in the case of *Jo. V. Morgan*. The case of *Henry G. Wood* involves the additional question of whether that portion of the income

earned by and paid to him outside of Maryland before he became a resident or was domiciled therein is constitutionally taxable by the State. In the case of Alexander Tucker there is presented this additional question: Can the State of Maryland constitutionally impose an income tax upon compensation paid him for services rendered the Federal Government in the District of Columbia during the time he was temporarily residing in Maryland, when he was admittedly domiciled in New Jersey? The case of J. H. Lewis presents this additional question: Can Maryland impose an income tax upon the compensation paid a member of the Armed Forces of the United States for services performed in the District of Columbia under orders of his superiors, while temporarily residing in Maryland, when he was admittedly domiciled in Michigan?

**Re: Petitioner, Jo. V. Morgan.**

During the calendar year 1939 petitioner was, and still is domiciled in Montgomery County, Maryland.

In accordance with an Act of Congress approved May 16, 1938, petitioner was on May 18, 1938, duly appointed the sole member of the Board of Tax Appeals for the District of Columbia for a term of four years at a definite annual compensation. He accepted the appointment and took office on July 1, 1938, after having taken the prescribed oath. Throughout the year 1939, the taxable year here involved, petitioner was the sole member of the Board of Tax Appeals of the District of Columbia. Such Board had jurisdiction to review the assessment of all taxes imposed by the District of Columbia, and the power to affirm, cancel, reduce or increase any assessment of taxes. In addition to its definite jurisdiction, such Board of Tax Appeals acts in an advisory capacity in all matters relating to District taxation. Appeals from its decisions lie directly to the United States Court of Appeals for the District of Columbia (R. 19-20).



Under the regulations promulgated by the Comptroller of the State of Maryland and the opinions of the Attorney General of that State, the Comptroller exempted from the operation of the Maryland Income Tax Law the compensation paid by Maryland to its constitutional and public officers, including members of the State Tax Commission, who took office prior to April 13, 1939, the effective date of the Maryland Income Tax Law (R. 19).

Petitioner filed an income tax return with the Comptroller of the State of Maryland reporting his compensation as the sole member of the Board of Tax Appeals for the District of Columbia, but, claiming exemption therefor, did not include the same in the computation of the tax. However, the Comptroller included petitioner's compensation and assessed the deficiency herein involved. Without the inclusion of this compensation no tax is due (R. 19). Petitioner filed a timely appeal to the State Tax Commission of the State of Maryland (R. 19), in which he claimed that if the Maryland Income Tax Statute purports to tax this compensation, it violates the doctrine of implied immunity under the Constitution of the United States, the Fourteenth Amendment thereof, and the Public Salary Tax Act of 1939; in that it discriminates, *inter alia*, against officers or employees of the United States, and of its agency, the District of Columbia, by exempting public officers of the State of Maryland from the tax (R. 21).

The State Tax Commission upheld the assessment. Within the time allowed by statute, a petition for review was filed in the Circuit Court for Montgomery County (R. 27-30), raising the same questions that he had raised in the State Tax Commission (R. 28-29). The Circuit Court for Montgomery County affirmed the decision of the Commission (R. 35). A timely appeal to the Court of Appeals of Maryland was filed which raised the same questions (R. 36-37). The Court of Appeals affirmed the decision of the lower court (R. 87).

**Re: Petitioner Henry G. Wood.**

Petitioner was duly appointed Legislative Counsel of the United States Senate. He held this position during the entire year 1939. The tax herein involved was assessed upon his compensation as such officer (R. 4-5). This office was created by Section 1303 of the Revenue Act of 1918, as amended by Section 1101 of the Revenue Act of 1924.

Petitioner resided in the District of Columbia from January 1 to March 23, 1939, at which time he purchased a residence in Montgomery County, Maryland, where on December 31, 1939, he was and still is domiciled. Petitioner's duties as Legislative Counsel of the United States Senate were performed and the compensation was paid him by the United States outside the boundaries of the State of Maryland.

A timely income tax return was filed with the Comptroller of the State of Maryland by petitioner, reporting all of his income for the calendar year 1939, including his salary as Legislative Counsel of the United States Senate and income from dividends. Petitioner claimed exemption among others on substantially the same ground as that claimed by petitioner Morgan (R. 5-6). The Comptroller assessed the deficiency here involved. A timely appeal from the assessment was filed with the State Tax Commission (R. 6), before which petitioner claimed exemption on substantially the same grounds as those claimed by the petitioner Morgan; and in addition thereto: (1) on the ground that the Maryland Income Tax Law violated the Fourteenth Amendment of the Constitution of the United States in that it severed the sources of income arbitrarily into two distinct classes, namely, investment income and ordinary income, and applied different credits and rates of taxation to such two classes (R. 11); and (2) that if the Maryland Income Tax Law purports to tax that portion of his income earned outside of the State prior to his becoming a resident of the State, it violates the Fourteenth Amendment of the Federal Constitution in that it is an at-

tempt to tax when the State did not have jurisdiction of either the person or the subject matter (R. 11). The assessment upon petitioner's entire compensation as a public officer of the United States for the calendar year 1939 was sustained by the State Tax Commission (R. 12). Petitioner filed a timely appeal to the Circuit Court for Montgomery County, Maryland, alleging error on all of the grounds relied upon in the State Tax Commission (R. 13-15). The Circuit Court reversed the Commission in respect of that portion of the salary earned by petitioner prior to becoming a resident of Maryland; but affirmed the decision in all other respects (R. 12). A timely appeal to the Court of Appeals of Maryland was filed, which raised the same questions (R. 17). The Court of Appeals reversed the Circuit Court and reinstated the order of the Commission (R. 87).

**Re: Petitioner, Alexander Tucker.**

Petitioner during the year 1939 and on December 31, 1939, maintained a place of abode in Montgomery County, Maryland, approximately fifty feet from the line separating Maryland from the District of Columbia. He was domiciled in the State of New Jersey (R. 37). On August 1, 1935, he was appointed an attorney in the Department of Justice from the Thirteenth Congressional District, State of New Jersey, and thereafter was assigned to duty in the City of Washington, D. C. His appointment was for an indefinite period of time, to continue at the will of and with the consent of the Attorney General of the United States. In order to perform the duties of his position, petitioner was required to reside in or near the City of Washington. Upon the termination of his present employment he intends to return to the State of New Jersey (R. 38). Petitioner's employment during the year 1939 was that of an attorney engaged exclusively in handling tax matters before the various United States Courts. While so engaged he had the title of Special Assistant to the Attorney General. His

compensation from the United States for the year 1939 was earned by him for services performed outside of Maryland and paid to him outside its boundaries (R. 38). Petitioner filed an income tax return with the Comptroller disclaiming any liability for tax. Upon the information contained in his return and the compensation paid petitioner by the United States, the Comptroller assessed the tax here involved. Petitioner filed a timely appeal to the State Tax Commission (R. 43), in which he claimed that the compensation paid to him by the United States was not subject to tax for substantially the same reasons as petitioner Morgan. In addition, petitioner contended that if the Maryland law purported to tax the income earned by and paid to him outside of Maryland, it violated the Fourteenth Amendment of the Constitution of the United States, for the reason that petitioner was domiciled in New Jersey, and was merely temporarily residing in Maryland (R. 43-44). The Commission upheld the assessment (R. 47). A timely appeal raising the same questions was filed in the Circuit Court for Montgomery County (R. 47). That court affirmed the Commission (R. 47). A timely appeal raising the same questions was filed in the Court of Appeals of Maryland (R. 55). The Court of Appeals affirmed the Circuit Court (R. 87).

**Re: Petitioner, J. H. Lewis.**

During the entire calendar year 1939 petitioner was domiciled in the State of Michigan (R. 58). In May, 1938, he was ordered to active duty as a Colonel in the National Guard of the United States and directed to report for duty to the National Guard Bureau in Washington, D. C. The orders directing him to so report stated that he would be relieved from duty in time to enable him to arrive at his home in Lansing, Michigan, in May, 1941, on which date he was to revert to inactive status. Colonel Lewis was on duty at the War Department in Washington, D. C., during the entire year 1939. During this period he resided in

rented premises in Chevy Chase, Montgomery County, Maryland.

Petitioner duly filed with the Comptroller an income tax return for the year 1939, in which he claimed exemption from tax on his income received as an officer in the National Guard of the United States. The Comptroller disallowed such exemption and assessed the deficiency in income tax here involved.

Under regulations promulgated by the Comptroller and the opinions of the Attorney General of Maryland, the Comptroller exempted from the operation of the Income Tax Law the compensation paid by Maryland to its constitutional and public officers, including Milton A. Reckord, General in the Maryland National Guard (R. 58). From the assessment the petitioner filed a timely appeal with the State Tax Commission, in which he claimed that the compensation paid him by the United States was not subject to tax for substantially the same reasons as stated by petitioner Morgan. In addition petitioner contended that if the Maryland law purported to tax the income earned by and paid to him outside of Maryland, it violated the Fourteenth Amendment of the Constitution of the United States, for the reason that petitioner was domiciled in the State of Michigan, and was merely temporarily residing in Maryland (R. 65-66). The Commission sustained the assessment. Petitioner filed a timely appeal in the Circuit Court for Montgomery County raising all questions theretofore raised (R. 67-68). That court affirmed the Commission (R. 70). A timely appeal was filed in the Court of Appeals of Maryland, raising the same questions (R. 70-73). The Court of Appeals affirmed the decision of the Circuit Court (R. 87).

**SPECIFICATION OF ERRORS TO BE URGED.**

The Court of Appeals of Maryland erred:

1. In not holding that the Maryland Income Tax Law violates the Fourteenth Amendment of the Constitution of the United States, the rule of implied intergovernmental immunity and the Public Salary Tax Act of 1939 by imposing an income tax upon compensation paid by the Federal Government and the District of Columbia to their officers and employees while exempting compensation paid by the State to its public officers holding office at the date of the enactment of its Income Tax Law.
2. In not holding that the Maryland Income Tax Law violates the Fourteenth Amendment of the Constitution of the United States by imposing a tax on that portion of a person's income earned and paid to him outside of the State prior to his becoming a resident or domiciliary of the State.
3. In not holding that the Maryland Income Tax Law violates the Fourteenth Amendment of the Constitution of the United States by imposing a tax upon compensation paid by the Federal Government to one of its officers or employees domiciled in another state for services rendered outside of Maryland, merely because such employee, in order to perform such services, temporarily resides in Maryland.
4. In not holding that the Maryland Income Tax Law violates the Fourteenth Amendment of the Constitution of the United States by imposing a tax upon the compensation paid by the United States to a member of the Armed Forces, domiciled in another state for services performed by him in the District of Columbia under orders of his superiors, merely because such person, in order to perform such services, was temporarily residing in Maryland.
5. In failing to hold the Maryland Income Tax Law violates the Fourteenth Amendment in that it arbitrarily divides income into two classes, namely, investment income and ordinary income, and applies different rates of taxation to each class.

**REASONS FOR GRANTING THE WRIT.**

**Re: Petitioner, Jo. V. Morgan.**

The lower court has erroneously decided an important question of Federal law which has not been, but should be settled by this Court. It involves the interpretation of Section 4 of the Public Salary Tax Act of 1939 (U. S. C. A. Title 5, Sec. 84 (a) ; c. 59, 53 stat. 575, Title 1, Sec. 4, Appendix, *infra* p. 25).

The lower court held that the taxation by Maryland of compensation paid by the United States and its agent, the District of Columbia, to their public officers while exempting from taxation the compensation paid by that State to its own public officers did not violate either the doctrine of implied intergovernmental immunity, as limited by *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466, or the Fourteenth Amendment to the Federal Constitution, or the Public Salary Tax Act of 1939.

1—The discrimination was one of law. It arose from the decision of the Court of Appeals of Maryland in *Gordy v. Dennis*, 176 Md. 106, 5 A (2d) 69, that taxation of compensation paid by Maryland to its judges and other public officers violated the Maryland Constitution, since it resulted in the diminution of the salaries it paid such officers. The tax imposed by the Maryland Income Tax Law, unlike the law in *O'Malley v. Woodrough*, 307 U. S. 277 is actually a gross income tax.

2—The discrimination was one of fact. It was real. The compensation paid the petitioner by the District of Columbia for his services as the sole member of its Board of Tax Appeals was taxed by the State. At the same time the State exempted the compensation paid by it to its public officers, including members of the State Tax Commission (R. 19).

The Board of Tax Appeals for the District of Columbia has the quasi-judicial function of reviewing the assessment of all taxes in the District, or affirming, cancelling, reducing



or increasing such assessments. In addition, it acts in an administrative advisory capacity in all matters relating to District of Columbia taxation (R. 20). In comparison, the State Tax Commission has the quasi-judicial function to review the assessment of taxes in Maryland. Such jurisdiction is similar to that exercised by the District Board of Tax Appeals (See Sections 191, 192, 194 (a) of Article 81, Ann. Code of Md., 1939, Appendix, *infra* pp. 20-22, and Section 247 of Article 81 Ann. Code of Md., 1939, Appendix, *infra* p. 24). In addition, it has the administrative functions of (a) a corporation commission, (b) of assessing taxes against certain corporations, and (c) of supervision of the administration of the tax laws of Maryland.

The discrimination is *general*, that is to say, between the petitioner, as a public officer of the District of Columbia, and the public officers of Maryland. It is *specific*, that is to say, between the petitioner, as the sole member of the Board of Tax Appeals of the District of Columbia, and members of the Maryland State Tax Commission. It is the kind of discrimination that the Public Salary Tax Act of 1939 intends to prevent. It is because of the source of petitioner's compensation, namely, his employment by the District of Columbia. If petitioner were employed by Maryland his salary would be exempt. It is a play of words to say that the compensation of petitioner was taxable because he was *not* employed by Maryland, and not because he *was* employed by the District of Columbia. A state may not do indirectly that which it cannot do directly. *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 113, 120; *Gordy v. Dennis*, *supra*, p. 126.

The effect of the discrimination is real. The petitioner is assumed to be proficient in the law of general taxation. Everything else being equal, he would not accept employment by the District of Columbia if he could obtain similar employment with the State of Maryland, since his compensation paid by the former would be subject to Maryland



taxation, while the compensation paid him by the latter would not be taxed.<sup>1</sup>

Furthermore, the court lost sight of the contention that the discrimination does not depend upon the State's technical characterization of its instrumentalities. The question is real, and where State officers are exempted, the burden exists where similar functions are performed through Federal instrumentalities, whether the Federal Government determines to perform such functions through its public offices, officers, or employees. The discrimination violates the rule of implied intergovernmental immunity under the Federal Constitution, as now limited by the decisions of this Court. The tax here involved was not a non-discriminatory tax laid on the income of all members of the community, as was upheld in *Helvering v. Gerhardt*, 304 U. S. 405, nor a "non-discriminatory general tax upon income of the employees of the Government" held constitutional in the *O'Keefe* case. In those cases the tax was imposed on the income of *all* of the members of the community, including the public officers of the particular taxing authorities. It is rather that character of tax to which Mr. Justice Frankfurter averted in his separate concurring opinion in the *O'Keefe* case when he observed that "State and federal governments must avoid exactions which discriminate against each other."<sup>2</sup>

<sup>1</sup> The lower court apparently recognized the soundness of this. It observed that "The discrimination can only be in effect. Discrimination in fact, to be found in a comparison of the situation of similar officers of the state, seems to us the only possible violation of the constitutional and statutory prohibition, and none is found." (R. 86.) Apparently, the lower court was unaware of the stipulation that compensation of the members of the State Tax Commission was *actually* exempt (R. 19), since in the opinion of the lower court it is stated that the compensation of such officials was *not* exempted (R. 85).

<sup>2</sup> Compare *Gordy v. Dennis*, 176 Md. 106, which holds that to impose the Maryland income tax upon compensation diminishes the compensation, with *O'Malley v. Woodrough*, 307 U. S. 277, which holds that the imposition of the Federal income tax does not result in such a diminution.

3—The trial court held (R. 34) that Congress could not grant any power to the State that the State did not already have to impose an income tax, and that Congress could not limit that power in any way. Hence when Congress, in the Public Salary Tax Act, consented to the taxation by the States of compensation of officers and employees of the United States it was only consenting to something the States already had. This question was left open by this Court in *Pittman v. Home Owners Loan Corp.*, 308 U. S. 21. See concurring opinion of Mr. Justice Frankfurter in the *O'Keefe* case, *supra*, p. 492. This question is one of general importance which should be authoritatively decided by this Court.

**Re: Petitioner, Henry G. Wood.**

In addition to the questions pertaining to petitioner Morgan, the lower court has erroneously decided the following:

1. The lower court held that Maryland may constitutionally levy a tax upon income earned by and paid to petitioner outside the State prior to his entering the State. The ruling is in effect that Maryland may tax where it has jurisdiction of neither the person nor the subject matter.<sup>3</sup> The Maryland tax is levied upon income. See *Gordy v. Dennis*, 176 Md. 106, 120, 129, 132, *et seq.* The tax is a gross income tax. The levy is "computed by adding 6 per cent of the investment income to 2½ per cent of the ordinary income, and subtracting from the amount thus arrived at 2½ per cent of the deductions allowed." (Sec. 230 (a) Art. 81, Ann. Code of Md. 1939, Appendix, *infra*, p. 23.) The decision conflicts with *Hart v. Tax Commission*, 132 N. E. 621; *Kentucky v. Commissioner*, 152 N. E. 747. This question is important.

<sup>3</sup> The historical note on page 383 of the Annotated Code of Maryland, 1939, states that Section 222 (i) was modeled in its entirety after the Kentucky Income Tax Law. In *Martin v. Gage*, 134 S. W. (2d) 966, the Kentucky court held that the Kentucky law intended to tax only income received after entering the State. Thus the constitutional objection was avoided.

2. The Maryland Income Tax Act of 1939 (Sec. 222 (n), (o), Appendix *infra*, pp. 22, 23) divides income into two classes, namely: "investment income" and "ordinary income". The tax on the first is 6 per cent, on the latter 2½ per cent. The classification violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States,<sup>4</sup> in that it is purely arbitrary and unreasonable. It is in no sense based upon ability to pay. While State legislatures have great latitude in determining proper classifications, search as one may, no valid reason can be found for such a division of income. Any difference in the two classes is irrelevant and artificial. In upholding the tax the decision below conflicts in principle with this court's decision in *Colgate v. Harvey*, 296 U. S. 404, 423.

**Re: Petitioner, Alexander Tucker.**

1—The reasons for granting the writ advanced in the preceding cases apply with equal force in this case.

2—The lower court has erroneously decided a matter of general importance which should be authoritatively decided by this Court. Its decision conflicts in principle with the decision of this Court in *District of Columbia v. Murphy, et al.*, 314 U. S. 441.

In this case the State concedes that the petitioner is domiciled in New Jersey, and merely maintained an abode in an apartment in Maryland during 1939 while employed in the District of Columbia by the Federal Government. The income tax here assailed was assessed against the petitioner because the Maryland Income Tax Law of 1939 purported to tax the income of "every resident" wherever earned, and

<sup>4</sup> Part of the levy here is upon "investment income". See petitioner's return, which though not printed is a part of the record. See Stipulation (R. 3).

This question, though not referred to in the lower court's opinion, evidently because of its former decision in *Oursler v. Tawes*, 178 Md. 471, was raised below (R. 14, 17).

defines the term "resident" to mean any individual maintaining a "place of abode" in the State for more than six months of the taxable year, whether domiciled therein or not. (Sec. 222 (i), 230 (a), Art. 81, Ann. Code Md. 1939. Appendix, *infra* pp. 22, 23.) The validity of this section when applied to an individual, domiciled in another state, whose compensation is earned by, and paid to him outside of Maryland is thus placed squarely in issue in this case.

Many of the States<sup>5</sup> have provisions fixing the taxable status of individuals somewhat similar to the terms of Section 222 (i) of the Maryland law (Appendix, *infra* p. 22). The validity of such provisions is a matter of general importance which should be authoritatively decided by this Court. The decision of this Court in *N. Y. ex rel. Cohn v. Graves*, 300 U. S. 308, did not decide the question presented, because there the taxpayer was actually domiciled in New York, although she was described in the decision as a "resident". The distinction there was not important. Moreover, the taxing statute of New York requires "permanent" residence. "Residence" within the meaning of the New York statute means an abode "of no transient character and so long continued and so substantial, as to be of a permanent nature". *N. Y. ex rel. Ryan v. Lynch*, 262 N. Y. 1. In New York "residence" is synonymous with "domicile". See also *Rockefeller v. O'Brien*, 224 Fed. 541, affirmed, 239 Fed. 127 (C. C. A. 6th), certiorari denied, 244 U. S. 50.

A permanent place of abode amounting to domicile is the only reasonable basis for jurisdiction to tax the income of an individual earned and paid outside of the taxing state. To permit a state to acquire jurisdiction to tax the income of a domiciliary of another state, such income being earned

<sup>5</sup>Six states (Ga., Ky., La., Okla., Utah and Va.) have substantially the provisions as the Maryland law. Ten States (Ark., Col., Ia., Kan., Mont., N. Y., N. D., W. Va., and Wis.) require a "permanent" place of abode. Three states (Cal., Del., and Mo.) have provisions which in effect require domicile or "permanent" abode.

and paid in a third state, because of the mere presence of the domiciliary in the first state for six months, leads to the legal absurdity that many states have the right to tax the same income. Petitioner concedes the state of an individual's domicile has jurisdiction to tax his income from all sources. It is also conceded a state may tax income earned within the state whether or not the recipient is domiciled therein. But if an individual may be taxed upon all of his income in a state in which he merely maintains an abode for an arbitrary length of time, it is clear the same income may be taxed numerous times, particularly if such individual is a Federal employee with a permanent station in the District of Columbia who is required to travel from state to state in the performance of his duties.

The lower court apparently believed that the "credit" provisions of the Maryland law avoided the possibility of burdensome taxation. The credit provisions, however, do not provide such a safeguard. In the first place the rates of taxation in the several states are not uniform. Secondly, some states have a net income tax while Maryland has what is really a gross income tax with rates varying according to the character of the income. Thirdly, the Maryland law qualifies the allowance of a credit by making it dependent upon the provisions of the acts of the other states, which, in effect, nullifies its benefits. (Sec. 231 and 232, Art. 81 Ann. Code, Md. 1939. Appendix *infra* pp. 23, 24.) There is nothing magical in the allowance of a credit. It can not validate an invalid tax. In *Curry v. McCanless*, 307 U. S. 357 this Court held that taxation of the same income by two states did not affect the taxing power of either. A necessary corollary to that rule is that the allowance of a credit cannot legalize a tax, otherwise invalid.

The doctrine of *quid pro quo*, upon which the lower court relied is not absolute. *Cohn v. Graves*, *supra* does not go that far. Many persons, such as sojourners, visitors, soldiers on leave using the highways to and from camp and congregating for amusement or for other personal reasons

at nearby places, enjoy the police, sanitary, fire protection, courts and other services of Government. No one would contend (except the officials of Maryland as to soldiers) that such individuals are subject to the income tax laws of the state in which they pause merely because they enjoy the services of government.

Under the circumstances of this case, it is an arbitrary, unreasonable and unconstitutional exercise of the taxing power, in violation of the due process clause of the 14th Amendment to the Federal Constitution, for Maryland to tax the income of this petitioner.

**Re: Petitioner, Joseph H. Lewis.**

1. The reasons for granting the writ advanced in respect of petitioner Morgan apply with equal force to this case.

Petitioner was an officer in the National Guard of Michigan on active duty in the War Department in Washington. His compensation as such was taxed by Maryland (R. 58), while the compensation Maryland paid to the General of its own National Guard was exempt (R. 58).

2. The lower court erroneously sustained the assessment against petitioner contrary to the provisions of Section 17 of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942, approved October 6, 1942. (Public No. 732, 77th Congress, Chapter 581, 2d Session, Appendix, *infra* pp. 25, 26.)

The lower court held that Maryland could lawfully tax the compensation paid by the United States to petitioner, a domiciliary of Michigan, while he was absent from that state in compliance with military orders.

The Maryland Income Tax Law purports to impose a tax on the income of "every resident" of that State (Sec. 230, Art. 81, Ann. Code of Md. 1939, Appendix, *infra* p. 23). Section 222 (i) of that law defines "resident" to mean any "individual who, for more than six months of the taxable year maintained a place of abode within this State, whether domiciled in this State or not" (Appendix, *infra*, p. 22). The Comptroller held petitioner to be a "resi-

dent" of Maryland, and taxed his compensation accordingly.

Section 17 of the Soldiers' and Sailor's Civil Relief Act Amendments of 1942 (Appendix, *infra*, pp. 25, 26), provides, however, that petitioner "shall not be deemed to have lost a residence or domicile" in Michigan while absent therefrom in compliance with military orders, "or to have acquired a residence or domicile in, or to have become resident in or a resident of" Maryland. The amendment further provides that "for the purposes of taxation in respect of the income or gross income of any such person by any State, \* \* \* of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, \* \* \*." The amendment is effective as of September 8, 1939. The lower court should have held that the assessment was invalid.

Regardless of the provisions of the amendment, Maryland was without power to tax the compensation paid by the United States to petitioner while he was merely temporarily residing in Maryland during the performance of his military duties.

### CONCLUSION.

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

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